No. 87-1589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 36.1.

STATEMENT OF THE CASE

Under § 10901 of the Interstate Commerce Act ("ICA"), a non-carrier can acquire and operate a railroad line "only if the [Interstate Commerce] Commission finds that the present or future public convenience and necessity require or permit" that to be done. 49 U.S.C. § 10901(a). If the Interstate Commerce Commission ("ICC" or "Commission") so finds, it may approve the acquisition "with conditions the Commission finds necessary in the public interest . . . ." 49 U.S.C. § 10901(c)(1)(A)(ii). The ICC thus has discretion to condition its approval, when in the public interest, upon protection

of employees who may be adversely affected by the acquisition.[1]

Under § 10505 of the ICA, the Commission "shall exempt a person, class of persons, or a transaction or service" from various regulatory provisions of the ICA if the application of those provisions "is not necessary to carry out the transportation policy" set forth in 49 U.S.C. § 10101a. 49 U.S.C. § 10505(a)(1). Among other things, however, such an exemption "does not relieve a carrier of its obligation to protect the interests of employees" insofar as such protection is afforded by the ICC under § 10901 or other provisions of the ICA. 49 U.S.C. § 10505(g)(2). And, the "Commission may revoke an exemption" when "necessary to carry out the transportation policy of section 10101a . . . ." 49 U.S.C. 10505(d). The ICC thus retains its regulatory jurisdiction over exempt transactions including any duty or discretion to require protection of adversely-affected employees.[2]

In Ex Parte No. 392 (Sub-No. 1), the ICC adopted under § 10505 a class exemption from the procedures that otherwise would apply to a line transaction under § 10901 and established expedited procedures under which, among other things, such a transaction could be consummated seven days after the filing of notice of the transaction

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[1] See, *e.g.*, *I.C.C.* v. *Railway Labor Assn.*, 315 U.S. 373 (1942) (predecessor provision); *People of State of Ill.* v. *United States*, 604 F.2d 519 (7th Cir. 1979), *cert. denied*, 445 U.S. 951 (1980); *Railway Labor Executives' Ass'n* v. *United States*, 697 F.2d 285 (10th Cir. 1983); *Railway Labor Executives' Ass'n* v. *I.C.C.*, 784 F.2d 959 (9th Cir. 1986); *Railway Labor Executives' Ass'n* v. *United States*, 791 F.2d 994 (2d Cir. 1986); *CMC Real Estate Corp.* v. *I.C.C.*, 807 F.2d 1025 (D.C. Cir. 1986).

[2] See, *e.g.*, *United Transp. Union* v. *Norfolk and Western R. Co.*, 822 F.2d 1114, 1122-1123 (D.C. Cir. 1987), *cert. denied*, 56 U.S.L.W. 3457, 3460 (1988); *G. & T. Terminal Packaging* v. *Consolidated Rail*, 830 F.2d 1230, 1234-1235 (3d Cir. 1987), *cert. denied*, 56 U.S.L.W. 3682 (1988).

with the Commission. *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985) ("*Ex Parte 392*").[3]

Rejecting arguments by Respondent Railway Labor Executives' Association ("RLEA") to the contrary, the ICC concluded that employee protections normally should not be required as a condition upon transactions approved pursuant to that exemption procedure. 1 I.C.C.2d at 813-815. However, the ICC expressly reserved jurisdiction to "revoke the exemption, in whole or in part, and impose labor protection" upon "an exceptional showing of circumstances" in an individual case. 1 I.C.C.2d at 815. On appeal by RLEA and others, *Ex Parte 392* was affirmed "for the reasons set forth in the decision of the Commission," in a *per curiam* judgment attached as Exhibit A hereto. See *Illinois Commerce Com'n* v. *I.C.C.*, 817 F.2d 145 (D.C. Cir. 1987).

Petitioner, the Pittsburgh & Lake Erie Railroad Co. ("P&LE"), which is in dire financial condition, agreed to sell all its rail lines to a noncarrier pursuant to § 10901 and the *Ex Parte 392* procedure. Notice of that transaction was filed with the ICC on September 19, 1987, the ICC denied RLEA's request for a stay of the effectiveness of the exemption under that procedure, and thus the ICC's exemptive approval of the transaction became effective on September 26, 1987. A petition by RLEA to revoke that exemption is pending before the ICC. In the meantime, however, the RLEA had filed a complaint with the district court below to enjoin the sale

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[3] In a decision served on February 29, 1988 in Ex Parte 392 (Sub-No. 1), the ICC made some adjustments (not relevant here) in the procedures thus adopted, but concluded (page 2) that in general "the exemption process has been successful" and that the ability of new carriers under that process "to begin operations promptly is a key to the exemption's success" in facilitating the establishment of "new carriers" which "preserve service, jobs, and rail investment" and which "typically provide better service, more tailored to individual shippers' needs." See 53 Fed. Reg. 5981.

unless and until P&LE exhausted the procedures of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, through collective bargaining with RLEA's member unions over the carrier's decision to sell its rail lines and over the effects of any such sale upon its employees.[4] And, on September 15, 1987, the P&LE was struck by those unions.

On October 8, 1987, the district court preliminarily enjoined that strike (Pet. App. B.). Judge Bloch concluded that the strike was intended to negate the ICC's determination that employee protections should not be required in such § 10901 transactions; that the ICA relieved the P&LE of any duty to bargain with the unions that otherwise might exist under the RLA; and that § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, must be accommodated to the purposes of the ICA and to the jurisdiction of the ICC thereunder to determine what employee protections, if any, should be required in § 10901 line sales. Pet. at B-7 and B-8. On October 26, 1987, the Third Circuit summarily reversed in an opinion that was limited to the Norris-LaGuardia issue (Pet. App. A.). While the Third Circuit acknowledged decisions by this Court holding that Norris-LaGuardia should be accommodated to other statutes "adopted as a part of a pattern of labor legislation," in its view § 10901 of the ICA is not such a statute because the "ICC's authority to consider the incidental effects of the transaction on labor and its discretionary authority to require provisions that protect employees do not make the Interstate Commerce Act comparable to the Railway Labor Act, which contains a comprehensive scheme of alternative dispute resolution mechanism." Pet. at A-6 and A-9.

[4] Those procedures include conferences, mediation and, at the discretion of the President, investigation and recommendations by an emergency board. See *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969). With good reason, they have been characterized by this Court as "long and drawn out," *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966), as "almost interminable," *Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969), and "as virtually endless," *Burlington Northern Railroad Co.* v. *Brotherhood of Maintenance of Way Employes*, —— U.S. ——, 55 U.S.L.W. 4576, 4580 (1987). In NRLC's experience, it is not at all unusual for the exhaustion of those procedures to take two years or more. Moreover, if exhausted without agreement, the union may strike the railroad with which the dispute exists and secondarily picket all other railroads. *Burlington Northern, supra.* Requiring P&LE to exhaust those procedures would nullify the ICC's authorization of the sale. The lower courts almost uniformly have rejected complaints by RLEA and member unions seeking to enjoin such line sales on the basis of an alleged duty by the selling carrier to bargain with the unions under the RLA. See Pet. at 13-14. The sole exceptions are the decision by the district court, following the Third Circuit's remand in this case, reversing its prior decision on the RLA issue (see Pet. at 10-11); and the April 8, 1988 decision by the Third Circuit affirming that decision by the district court (Docket No. 87-3797). We understand that P&LE intends to petition for a writ of certiorari to review also that decision by the Third Circuit, which we believe to be erroneous. A grant of that petition and the instant petition will enable this Court to review all legal aspects of this line sale controversy.

INTEREST OF AMICUS CURIAE

The National Railway Labor Conference ("NRLC") is an unincorporated association which includes almost all of the nation's class I railroads among its members. NRLC represents member railroads in multi-employer collective bargaining under the RLA as well as in regard to a variety of other labor relations matters of concern to the railroad industry generally.

NRLC does not participate in and has no control over decisions by a member railroad to sell or otherwise dispose of a line, or as to whether to bargain with a union about such matters, or in any bargaining that may occur. On occasions in the past, however, NRLC has been confronted with union proposals for a national agreement in regard to protections for employees affected by a transaction approved by the ICC, has maintained that such issues should be determined by the ICC, and has

never agreed to such protections on behalf of members participating in such national bargaining. Since the decision below radically departs from what NRLC heretofore has understood to be the law, a reversal of that decision is of importance to NRLC in its role as the national bargaining representative for member railroads.

Reversal of that decision also is of paramount importance to the individual railroads, to potential future railroads that may acquire a line or lines from an existing railroad, and to shippers. The class I railroads long have been seriously handicapped in their efforts to operate profitably in the face of ever-increasing truck competition by obsolete work rules and a mileage basis of pay (in which 100 miles of operation generally was equated to eight hours of work), often dating back to the nineteenth century, which resulted in gross overmanning, a lack of flexibility in operating trains, and labor costs that often consumed 50% or more of gross operating revenues. Although some progress has been made, particularly in recent years, in negotiating collective bargaining agreements—including national agreements negotiated by the NRLC—that have afforded some amelioration, that usually has been the work of decades stretching over several rounds of bargaining, and much remains to be done. This situation has been a factor in the series of railroad bankruptcy that brought about creation of a government-subsidized Conrail out of the Penn Central and several other bankrupt northeastern railroads, without which much of the northeast could have been deprived of any railroad service; to the dismemberment in bankruptcy of such major railroads as the Milwaukee and the Rock Island; and to the abandonment of thousands of miles of track which often deprived agricultural areas, towns and even substantial cities, and of course shippers located therein, of railroad service.

In recent years, line sales to newly-created carriers have become an increasingly important aspect of efforts

to rationalize the railroad structure and thus to enable the railroad industry to compete more effectively while continuing to provide railroad service. This development, its causes and consequences, have recently been described by the ICC in *FRVR Corporation, Etc.*, Finance Docket No. 31205, served January 29, 1988, a copy of which is attached as Appendix B hereto (appeal pending, Docket No. 88-1280, 8th Cir.).

Since 1980, "nearly 200 short-line and regional railroads have come into existence—partially reversing the industry's long trend of exit and contraction." App. at 1a. This "trend away from abandonment and towards the formation of short-line and regional carriers . . . was given impetus by a change in 1982 in Commission labor protection policy . . . ." App. at 4a. Prior to that time, the Commission's approval of a sale to a non-carrier "might have been conditioned upon comprehensive (and potentially quite expensive) labor protection," but by 1982 the ICC "had determined that the expense of labor protection foreclosed short-line development, forcing the less attractive abandonment alternative . . . ." App. at 5a. The ICC thus exercised its discretion in individual cases to deny labor protection, and after "consideration of scores of individual applications, the Commission decided" in *Ex Parte 392* "that the development of new small railroads was overwhelmingly beneficial and should be encouraged and allowed to proceed with a minimum of regulatory cost and delay." App. at 5a.

That "policy has been validated by practical results"—"[n]ew railroad formation quickened, abandonments fell, service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved." App. at 6a. An analysis by the Commission's staff demonstrated "that employment on the new lines, particularly the larger regional carriers, is typically drawn from the work force of the selling carrier." App. at 6a n. 11. The employees of those new carriers, of course,

have the same right as employees of existing carriers under § 2 Ninth of the RLA to select, through the vote of a majority in a craft or class, a union to represent them in collective bargaining with that new carrier. 45 U.S.C. § 152 Ninth. However, even if the new carrier is a "successor" to the selling carrier in legal contemplation, it has no obligation to assume the collective bargaining agreements made by the vendor company. Rather, it may establish unilaterally the rates of pay, rules and working conditions applicable to its employees, so that the onus is upon the unions to bring about a change through the procedures of the RLA.[5] This new start in labor agreements is largely responsible, in NRLC's opinion, for the fact found by the ICC that "[m]arkets that produce losses when operated by Class I railroads can produce profits for smaller, more efficient local carriers." App. at 4a.

Although this ICC policy facilitating line sales generally has been "supported and welcomed," it "has been consistently opposed by organized rail labor." App. at 6a-7a. The rail unions recently have extended that opposition from arguments to the ICC, and on appeal therefrom to the courts, to a concerted campaign, apparently coordinated by the RLEA, of litigation and strikes or threatened strikes contesting the implementation of authorized line sales, in reliance upon the RLA and Norris-LaGuardia. While much of the resulting litigation is still working its way through the lower courts, that campaign was unsuccessful insofar as judicial decisions are concerned (although sometimes successful in delaying implementation of approved transactions pending decision) until the decision by the Third Circuit in this case. As the ICC also found, that "decision has had an immediate impact on the formation of small railroads," and is "threatening to halt the revitalization of the marginal railroad sectors—a restructuring that the Commission has found to be in the interest of carriers, labor, and the shipping public." App. at 12a.

[5] Those principles have been established by this Court under the National Labor Relations Act, in decisions recently reaffirmed and amplified in *Fall River Dyeing & Finishing Corp.* v. *NLRB*, —— U.S. ——, 55 U.S.L.W. 4706 (1987). They have been applied by the lower courts under the RLA, and apparently no longer are contested by the railroad unions. See, *e.g.*, *Matter of Chicago, M., St. P. & Pac. R. Co.*, 658 F.2d 1149, 1174-1175 (7th Cir. 1981), *cert. denied sub nom., RLEA* v. *Olgivie*, 455 U.S. 1000 (1982); *Brotherhood of Railway, Etc.* v. *REA Express Inc.*, 523 F.2d 164, 170 (2d Cir. 1975), *cert. denied*, 423 U.S. 1017, 1073 (1976).

The interest of the NRLC and of member carriers in securing a reversal by this Court of that decision not only is obvious, therefore, but also accords with the public interest as found by the ICC.

REASONS FOR GRANTING THE WRIT

The Petition presents an important issue of law, involving the relationship between the ICA and the Norris-LaGuardia Act, which was wrongly decided by the court below in an opinion which conflicts with principles established by this Court and applied by other courts of appeals.

A. The Issue Presented Is Important.

Briefly stated, the Congress has given the ICC discretionary jurisdiction to determine whether protections for employees (and the extent of such protections if ordered) is in the public interest when a line sale is authorized under § 10901 of the ICA; the ICC has determined pursuant to that jurisdiction as a matter of general policy that employee protections are not in the public interest and will not be imposed in the absence of exceptional circumstances; that policy determination has been sustained by the federal courts on direct review instigated by, and over the opposition of, RLEA among others; the ICC has applied that general policy in authorizing the sale of P&LE's lines without labor protections; the RLEA

struck the P&LE so as to prevent implementation of that sale without the employee protections which it demands; the Third Circuit, without in any way questioning the ICC's jurisdiction or the validity of its authorization of the sale, has held that Norris-LaGuardia deprives the federal courts of jurisdiction to enjoin that strike; and the ICC, as well as the P&LE, the NRLC and others, disagrees with that decision.

This case thus presents an apparent conflict between important federal statutes, and a disagreement between a federal court and a federal agency as to how that issue should be resolved, which this Court should resolve even if the underlying issue were not of much intrinsic importance. But however that may be, the importance of that issue in itself can hardly be gainsaid. We need not repeat, although we reiterate, the foregoing explanation (pp. 6-9 *supra*) of the importance of line sales to the railroad industry and to the public—and thus of the decision below which threatens to prevent the consummation of such sales despite their authorization by the ICC. The efforts by the RLEA and member unions to frustrate such government-authorized sales, through reliance upon the RLA and the Norris-LaGuardia Act, is the most-litigated and most important railway labor-management controversy now facing the federal courts. Review by this Court of the decision below should go far towards laying that controversy to rest.[6]

B. The Decision Below Is Wrong.

The Congress enacted the Norris-LaGuardia Act in 1932 (47 Stat. 70) "to remedy the growing tendency of

[6] Moreover, while line sales to new carriers are the heart of the current controversy, the ramifications of the decision below are not limited to such transactions. The ICC also has jurisdiction (including the employee protections, if any, to be imposed) over many other railroad transactions, such as abandonments and a variety of multicarrier transactions, including mergers, consolidations, and line sales to existing carriers. See pp. 13-16 *infra*.

federal courts to enjoin strikes by narrowly construing the Clayton Act's labor exemption from the Sherman Act's prohibition against conspiracies to restrain trade . . . ." *Jacksonville Bulk Terminals* v. *Longshoremen*, 457 U.S. 702, 708 (1982).[7] Although this Court "has consistently given the anti-injunction provisions of the . . . Act a broad interpretation," the Court also has held those provisions to be inapplicable "where necessary to accommodate the Act to specific federal legislation or paramount congressional policy." *Ibid.* In short, the "accommodation" doctrine simple reflects the general rule of "[s]tatutory interpretation" that "consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Boys Markets* v. *Clerks Union*, 398 U.S. 235, 250 (1970). Among other things, this means that Norris-LaGuardia is accommodated so that it does not prevent the effectuation of statutes in which "congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and *to administrative techniques for the peaceful resolution of industrial disputes.*" *Id.* at 251 (emphasis added). See also, *e.g.*, *Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30, 39-42 (1957).

Although the Third Circuit acknowledged that Norris-LaGuardia should be accommodated when "necessary to enforce some other overriding and equally clear federal labor policy," (Pet. at A-6), in its view § 10901 is not "a labor law" (Pet. at A-8) because protection of the interests of labor is only one of "fifteen policies relevant to the regulation of the railroad industry" set forth in the national transportation policy, 49 U.S.C. § 10101a. Pet. at A-7. "The ICC's authority to consider the inci-

[7] "The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act . . ., which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent." H. Rept. No. 669, 72d Cong., 1st Sess. (1932) at 3.

dental effect of the transaction on labor and its discretionary authority to require provisions that protect employees do not make the Interstate Commerce Act comparable to the Railway Labor Act, which contains a comprehensive scheme of alternative dispute resolution mechanisms." Pet. at A-9.[8]

This grudging acknowledgment of the accommodation doctrine would convert that doctrine into a mechanical comparison of other statutory provisions to the RLA rather than a consideration of "the total corpus of pertinent laws and the policies that inspired ostensibly inconsistent provisions" so as to accommodate Norris-LaGuardia "to specific federal legislation or paramount federal policies." But even on the Third Circuit's terms, the jurisdiction of the ICC to determine the extent of labor protections to be imposed in authorizing line sales under § 10901 of the ICA surely constitutes "an overriding and equally clear federal labor policy." The Congress has thus provided an "administrative technique[] for the peaceful resolution" of labor disputes at least as clearly as it did in requiring the arbitration of grievance disputes under the RLA to which Norris-LaGuardia was accommodated in *Chicago R. & I.R. Co., supra*, or in authorizing agreements to arbitrate grievance disputes by

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[8] The Third Circuit also erred in relying upon *Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960). See Pet. at A-9 and 10. While some of the station closings were approved by state regulatory agencies, that was done pursuant to state law (rather than pursuant to the ICA as the Third Circuit erroneously stated). See 362 U.S. at 332-333, 347-348, 353 & n.18. *Telegraphers* did reject an "argument that the operation of unnecessary stations . . . runs counter to the congressional policy . . . to foster an efficient national railroad system," 363 U.S. at 342, but that argument was based upon the general transportation policies of the ICA rather than upon a specific statutory provision, such as § 10901, requiring ICC approval of a transaction and empowering that agency to condition its approval upon employee protections when in the public interest.

employees and unions under the National Labor Relations Act to which Norris-LaGuardia was accommodated in *Boys Markets, supra.* Indeed, line sales under § 10901 are only one of numerous categories of railroad transactions for which ICC approval is required under the ICA in proceedings that include consideration of labor protections.

The Transportation Act of 1920 (41 Stat. 456) amended the ICA to include provisions giving the ICC jurisdiction over abandonments, line sales to non-carriers and other single-carrier transactions (§§ 1(18) and (20), 41 Stat. 477-478), and over mergers and other multicarriers transactions (§ 5(2), 41 Stat. 481), and also enacted the predecessor of the RLA (41 Stat. 469-474). In *United States* v. *Lowden*, 308 U.S. 225, 235 (1939), this Court described both aspects of that 1920 Act as part of the "now extensive history of legislation regulating the relations of railroad employees and employers." The Court confirmed the discretionary authority of the ICC to condition its approval of mergers and other multicarrier transactions pursuant to § 5(2) of the amended ICA upon protection of employees when in the public interest. That authority may "promote the public interest in its statutory meaning by facilitating the national policy of railroad consolidation" by, among other things, "prevent[ing] interruption of interstate commerce through labor disputes growing out of labor grievances . . . ." 308 U.S. at 238.

In *ICC* v. *Railway Labor Assn.*, 315 U.S. 373 (1942), this Court held that the ICC had the same discretionary authority to condition its approval of abandonments and other single-carrier transactions pursuant to §§ 1(18) and (20) of the amended ICA upon protection for employees. As is true of the comparable "public interest" standard involved in *Lowden*, those provisions required consideration of "the national interest in the stability of the labor supply available to the railroads," as the "possible unstabilizing effects on the national railroad system"

of labor problems "are no smaller in the case of an abandonment like the one before us than in a consolidation like that involved in the *Lowden* case." 315 U.S. at 377.

The Transportation Act of 1940 (54 Stat. 898) amended § 5 of the ICA to mandate employee protections as a condition upon the ICC's approval of mergers and other multicarrier transactions thereunder (§ 5(2)(f), 54 Stat. 906-907). That provision merely gave "legislative emphasis to a policy and practice already recognized by § 5(4)(b) by making the practice mandatory instead of discretionary . . . ." *United States* v. *Lowden*, *supra*, 308 U.S. at 239; *accord*, *ICC* v. *Railway Labor Assn.*, *supra*, 315 U.S. at 379. Indeed, those mandatory protections constituted a minimum and the ICC retained discretion to impose additional labor protections. *Railway Labor Assn.* v. *United States*, 339 U.S. 142 (1950). But in thus mandating employee protections as to approved mergers, etc., the Congress had modified a proposed Harrington Amendment which otherwise "threatened to prevent all consolidations to which it related" by prohibiting ICC approval "if such transaction will result in unemployment or displacement of employees . . . or in the impairment of existing employment rights of said employees." 339 U.S. at 150-151. Thus, even as to such transactions, the Congress intended to require only limited compensatory protections rather than a job freeze. *Maintenance Employes* v. *United States*, 366 U.S. 169, 174-177 (1961).

The Railroad Revitalization and Regulatory Reform Act of 1976 (90 Stat. 31) included provisions, enacted as § 1a of the ICA (90 Stat. 127-130), separating abandonments from other single-carrier transactions which had been governed by § 1(18) and mandating employee protections for certain approved abandonments (§ 1a(4), 90 Stat. 128). However, the Commission retained "wide discretion" to fit employee protections "to the facts and circumstances attending a particular abandonment," including the imposition of "labor protection only upon the

existing carrier, not upon a non-carrier that may acquire an abandoned line in order to resume service," and "refrain[ing] from imposing any labor protection at all . . . in whole line abandonments." *Simmons* v. *ICC*, 697 F.2d 326, 335-336 (D.C. Cir. 1982). The ICC continued to have discretion under § 1(18) as reenacted (90 Stat. 123-124) to determine what employee protections, if any, are in the public interest in regard to line sales to non-carriers. *People of State of Ill.* v. *United States*, *supra*, 604 F.2d at 524-527.

The ICA was codified and reenacted in 1978 as Subtitle IV of 49 U.S. Code. 92 Stat. 1337. The authority of the ICC over line sales and other single-carrier transactions apart from abandonments was codified as § 10901; its authority over abandonments was codified as § 10903; and its authority over mergers and other multicarrier transactions was codified as §§ 13341-13347; all without substantive change. The Staggers Act of 1980 (94 Stat. 1895) further amended the ICA to provide for mandatory or discretionary labor protections in connection with the abolition of rate bureaus (Sec. 219(g), 94 Stat. 1928), feeder line sales (49 U.S.C. § 10910(j)), reciprocal switching agreements (49 U.S.C. § 11103(c)(2)), and the construction of new rail lines (49 U.S.C. § 10901(e)). Moreover, the Congress precluded any employee protections in establishing a procedure (49 U.S.C. § 10905) for sales, including forced sales, of lines approved by the ICC for abandonment. *Railway Labor Executives' Ass'n* v. *United States*, *supra*, 791 F.2d at 1001-1003; *Simmons* v. *ICC*, 760 F.2d 126 (7th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986).

Hence, as the ICC has observed, since the provisions initially enacted by the Transportation Act of 1920 "Congress has routinely affirmed and expanded the importance of the Interstate Commerce Act as a part of the complex of laws governing labor relations in the rail industry . . . . For more than fifty years the Commission has

exercised its authority in this field, frequently at the request and with the support of labor, and our decisions have had enormous impact on the shape of rail labor relations throughout this period." *FRVR Corporation*, App. at 14a-15a.[9] Surely, those provisions of the ICA and the decisions of the ICC and the courts thereunder are "a part of the pattern of labor legislation" to which Norris-LaGuardia at the minimum should be accommodated.

Despite the view of the court below to the contrary, that is no less true because the ICC in carrying out its functions under § 10901 and related provisions of the ICA must take into consideration policies and interests in addition to the interests of rail labor. We agree with the ICC, as stated in *FRVR Corporation* (App. at 17a):

> "That the concern for labor equity is only one of many conflicting aspects of National Transportation Policy should not be seen as derogation of the agency's authority—rather it is precisely the reason why the Interstate Commerce Act must be recognized to have preeminence. It is the public policy of this Nation to regulate and supervise transportation at the national level so as to ensure the essential benefits of a critical aspect of commerce. While the means of regulation have changed markedly over the decades, the exclusive and plenary nature of the Commission's jurisdiction over consolidations, sales and abandonments have been consistently upheld. In the discharge of our responsibilities, we are charged with the expert resolution of many-sided conflicts between disputants, public and private. The recitation above of the factors leading to our [*Ex Parte 392*] policy illustrates the complexity of the process and information that led to our present policy."

[9] The Congress also has statutorily dealt with the issue of protection for railroad employees in the Rail Passenger Service Act of 1970, 45 U.S.C. §§ 501 *et seq.*, which created Amtrak (see 84 Stat. 1337, as amended, 45 U.S.C. § 565); in the Regional Rail Reorganization Act of 1974, 45 U.S.C. §§ 701 *et seq.*, which created Conrail (see Title V, 87 Stat. 1012-1020, which as thereafter amended was repealed by the Northeast Rail Services Act of 1981, 95 Stat. 669; which also enacted substitute—and reduced—labor protections as Title VII of the 3-R Act, 45 U.S.C. §§ 797 *et seq.*); in the Milwaukee Railroad Restructuring Act of 1979, 45 U.S.C. §§ 901 *et seq.*, which governed the dismemberment of the bankrupt Milwaukee railroad (see 93 Stat. 740-746, as amended, 45 U.S.C. §§ 907-912, 915); and in the Rock Island Railroad Employee Assistance Act of 1980, 45 U.S.C. §§ 1001 *et seq.*, which generally concerned protection for employees affected by the dismemberment of the bankrupt Rock Island railroad.

Although the purposes of the Federal Railroad Safety Act (45 U.S.C. §§ 421 *et seq.*) extend beyond the safety of employees (see 45 U.S.C. § 421), it has been held that Norris-LaGuardia does not prevent an injunction prohibiting a strike over a dispute as to whether hazardous conditions justify an employee's refusal to work in view of a FRSA provision making such disputes arbitrable (45 U.S.C. § 441(c)). *Boston and Maine Corp.* v. *Lenfest*, 799 F.2d 795, 800-804 (1st Cir. 1986), *cert. denied*, 55 U.S.L.W. 3571 (1987). "Only the availability of injunctive relief can insure that the FRSA will operate consistently with its purpose . . . to give employees the right to avoid hazardous conditions on the railroad, and to channel any such dispute into binding arbitration." *Id.* at 803. So, too, only the availability of injunctive relief can insure that the ICA can operate consistently with its purpose that the ICC determine whether line sales and various other railroad transactions are in the public interest and to resolve any dispute as to the employee protections to be provided in connection with such transactions.

Insofar as we have discovered, there is not a word in the legislative histories of the statutory provisions conferring upon the ICC jurisdiction over line sales and other railroad transactions which indicates that the Congress either contemplated or intended that rail labor

would nonetheless have the power to block effectuation of an approved transaction through strikes and picketing, either because Norris-LaGuardia would prevent an injunction against such strikes and picketing or otherwise. Certainly, none has been cited by RLEA or by the court below.

In *Missouri Pacific R. Co.* v. *United Transp. Union*, 782 F.2d 107, 111-112 (8th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3837 (1987), the Eighth Circuit held that Norris-LaGuardia must be accommodated to the power of the ICC to authorize multicarrier transactions (in that case, a trackage right agreement). Otherwise, a union could "frustrate . . . a consolidation approved by the ICC," and "Congress did not intend that affected employees have such power to block consolidations which are in the public interest." *Ibid.* That is equally true in regard to § 10901 line sales that the ICC has found to be in the public interest. This is particularly so since the Congress, in providing "administrative processes for the peaceful resolution" of labor disputes concerning the protection of employees affected by an approved transaction, has enabled the unions to present their views in that regard to the ICC and, on appeal therefrom, to the courts, just as the RLEA did in the *Ex Parte 392* proceeding. As the Eighth Circuit further stated in *Missouri Pacific*, it "is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired." 782 F.2d at 112.

We submit that the Eighth Circuit in *Missouri Pacific* correctly applied the accommodation doctrine as explained by this Court while the Third Circuit in the case now before this Court did not. But however that may be, this Court should take this opportunity to leave no doubt about the correct resolution of this important issue.

CONCLUSION

For the reasons stated above and in P&LE's Petition, this Court should grant a writ of certiorari and review the decision by the Third Circuit.

Respectfully submitted,

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Date: April 19, 1988

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 86-1107
86-1131

ILLINOIS COMMERCE COMMISSION, *et al.*,
Petitioners

v.

ICC & USA,
Respondents

Petition for Review of an Order of the
Interstate Commerce Commission

Before: EDWARDS and SILBERMAN, *Circuit Judges*, and *District Judge* PARKER,* United States District Court for the District of Columbia

JUDGMENT

[Filed May 12, 1987]

This cause came on to be heard on a petition for review of an order of the Interstate Commerce Commission, and was briefed and argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c). On consideration thereof, it is

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* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1982).

ORDERED and ADJUDGED, by this Court, that the petition for review of the order of the Interstate Commerce Commission in this matter is hereby denied for the reasons set forth in the decision of the Commission. It is

FURTHER ORDERED, by this Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
FOR THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX B

[Service Date Jan. 29, 1988]

INTERSTATE COMMERCE COMMISSION
DECISION
FINANCE DOCKET NO. 31205

FRVR CORPORATION—EXEMPTION ACQUISITION AND OPERATION—CERTAIN LINES OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—PETITION FOR CLARIFICATION

Decided: January 28, 1988

This decision is issued in response to a petition filed by the Chicago and North Western Transportation Company (CNW) and FRVR Corporation. FRVR is a new corporation formed for the purpose of acquiring and operating certain rail lines of the CNW. Petitioners seek a statement of this agency's views as to our jurisdiction over labor issues arising out of the formation of short-line railroads. The matter has become controversial in the past several years, due to the acceleration in the creation of regional and short-line railroads.

Since partial deregulation under the Staggers Rail Act of 1980 [1] nearly 200 short-line and regional railroads come into existence—partially reversing the industry's long trend of exit and contraction. These new roads now operate approximately 13 thousand miles of rail lines with 4 thousand workers handling more than 1.3 million carloads yearly.

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[1] Pub. L. No. 96-448, 94 Stat. 1941-45.

Up until the Staggers Act, the principal means of exit for large "Class I" railroads from unprofitable markets had been through abandonment. Substantial deregulation of motor freight under the 1980 Motor Carrier Act[2] threatened to accelerate this trend through new and increasingly efficient truck competition. Abandonment, by its nature, is most often a painful, disappointing process. It normally entails the permanent loss of jobs and railroad service, even though it has not always occurred in markets that are inherently unserviceable by rail. Markets that produce losses when operated by Class I railroads can produce profits for smaller, more efficient local carriers. These new carriers are potentially beneficial to nearly all concerned. They preserve rail service for the local economies and provide traffic feed for the larger carriers, enhancing employment prospects for rail labor —both on the smaller lines and throughout a reinvigorated Class I system—and they foster optimal recognition of the energy efficiencies and environmental benefits of rail service.[3]

The trend away from abandonment and towards the formation of short-line and regional carriers developed in response to the new business environment created by the Staggers Act. This development was given impetus by a change in 1982 in Commission labor protection policy which was in part based upon a provision of the Staggers Act which establishes a branch line sale process in which labor protection was foreclosed by the statute.[4] In the

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[2] Pub. L. No. 96-296, 94 Stat. 793.

[3] The National Rail Transportation Policy charges the Commission with the responsibility of ensuring the development of a sound rail transportation system, while encouraging fair wages and safe and suitable working conditions for labor. The Commission is also to encourage and promote energy conservation. *See* 49 U.S.C. 10101a.

[4] 49 U.S.C. 10905. *See Simmons* v. *ICC*, 760 F.2d 126 (7th Cir. 1985).

past, the typical sale of a short-line carrier might have been conditioned upon comprehensive (and potentially quite expensive) labor protection.[5] By 1982 the Commission had determined that the expense of labor protection foreclosed short-line development, forcing the less attractive abandonment alternative or an abandonment and sale under the provisions of 49 U.S.C. 10905. As labor protection in short-line sales to new entrants is within the Commission's discretion, the Commission began to withhold protection in individual applications[6] on the three-part theory that (1) in doing so rail service would be preserved, (2) the new railroads provided the best prospect for protecting the employment prospects of the affected labor and (3) it made no sense to force railroads to go through the more cumbersome process of abandonment under 49 U.S.C. 10903 and sale under 49 U.S.C. 10905 to achieve the same result. After consideration of scores of individual applications, the Commission decided in a 1986 notice and comment rulemaking that the development of new small railroads was overwhelmingly beneficial and should be encouraged and allowed to proceed with a minimum of regulatory cost and delay.[7] The Commission issued rules exempting certain classes of line sales from drawn out Commission regulation, retaining for itself the unqualified right to review and correct any

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[5] *See e.g., Durango and Silverton Narrow Gauge Railroad Co.—Acquisition and Operation*, 363 I.C.C. 292 (1979), *aff'd sub nom. Railway Labor Executives' Association* v. *United States*, 697 F.2d 285 (10th Cir. 1983) (Review Board decision noting that imposition of labor protection was discretionary).

[6] *See Knox and Kane Railroad Co.—Gettysburg Railroad Co.—Petition for Exemption*, 366 I.C.C. 439 (1982).

[7] Ex Parte No. 392 (Sub No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, aff'd sub nom. Illinois Commerce Commission* v. *I.C.C.*, 817 F.2d 145 (DC Cir. 1987). This decision is in keeping with the National Transportation Policy of minimizing the need for Federal regulation (49 U.S.C. 10101a(2)), as well as the policies noted in footnote 3 above.

unique problems that might arise out of exceptional circumstances.[8]

The Commission's policy has been validated by practical results. New railroad formation quickened,[9] abandonments fell,[10] service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved.[11] Most observers supported and wel-

[8] The Staggers Act expanded the Commission's exemption authority. Further, as is stated in the Conference Report, the Commission is *actively* to pursue exemptions for transportation and is to have a policy of reviewing carrier actions *after the fact* to correct abuses. *See* H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 104-105.

[9] New Railroad Formation

Year Est.	Number
1982	25
1983	20
1984	31
1985	28
1986	45
1987 *	70

* Preliminary figure based on notices filed.

[10] Miles of Lines Abandoned

Year	Miles
1982	5151
1983	2454
1984	3083
1985	2343
1986	2087
1987	1932

[11] The Commission's Office of Transportation Analysis is engaged in continuing study and research on the effect of the Commission's policy and the short-line/regional phenomenon. This study has included on-site interviews with labor and management, as well as data collection and analysis. This analysis demonstrates that employment on the new lines, particularly the larger regional carriers, is typically drawn from the work force of the selling carrier. Further, while initial employment levels are below those of the departing carrier, employment on some lines has grown over time as improved service attracts new business to the lines.

comed the Commission's policy initiative, but it has been consistently opposed by organized rail labor. Under the rules adopted in 1986, opposition to individual transactions is presented in petitions to revoke the grant of exemption. Such petitions have been filed in approximately 20 of the 120 transactions processed under the 1986 rules. Where petitions to revoke are filed, the Commission evaluates the basis for the revocation request, and has well-defined authority to correct any abuses that are shown.[12] The Commission's authority includes the power to impose labor protective conditions through partial revocation,[13] although under the rules this step will be taken only where exceptional circumstances are shown. The Commission would consider as exceptional, situations in which there was misuse of the Commission's rules or precedent,[14] or where existing contracts specified that line sales were subject to procedural or substantive protection.[15] Further, the exemption will be modified where labor can demonstrate injury that was unique, disproportionate to the gains achieved for the local transport system, and which can be compensated without causing termination of the transaction or substantially undoing

[12] *See Consolidated Rail Corporation—Declaratory Order—Exemption*, 1 I.C.C.2d 895 (1986), *cited approvingly, GAT Terminal Packaging Co., Inc.* v. *Consolidated Rail Corp.*, CA 84-1173 Slip op. (D.N.J. October 23, 1986). *See also* legislative history of the Staggers Act in footnote 8 above.

[13] *See Maryland Midland Railway, Inc.—Exemption from 49 U.S.C. 11343 and 11301* (not printed), served January 6, 1987.

[14] *Cf.* Order of Investigation, served May 18, 1987, in F.D. No. 30965, *Delaware and Hudson Railway Company—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company.*

[15] It is the Commission's standard labor protection policy in restructuring proceedings to preserve existing employment contracts insofar as possible, consistent with the merger, consolidation or abandonment authorized. *See* section 2 of the standard *New York Dock* conditions, 360 I.C.C. 84 (1979).

the prospective benefits of the Commission's existing policy for other communities and locales.[16]

The exemption proposal filed by CNW and FRVR corresponds quite well to our expectations and experience with the use of the Ex Parte 392 (Sub-No. 1) rules. At issue are 208 miles of light density lines in Eastern Wisconsin in the area between Green Bay and Milwaukee. The paper industry is the principal source of traffic and holds the greatest potential for traffic growth on the FRVR line. But to achieve growth means reversing the paper industry's increasing reliance on truck service. A verified statement filed by Petitioners indicates that rail market share of the outbound paper market was 54 percent of the total in 1977, but had fallen to under 20 percent by 1986. The number of motor carriers operating in the region has doubled and price competition is strenuous. The lines of the CNW may now be under additional pressure since its rail competition (which had been the Soo Line operating at relatively standard Class I costs) is a new regional operator, the Wisconsin Central. Wisconsin Central, as organized, has distinct cost advantages that will make long-term competition by CNW almost certainly impossible, absent a substantial improvement in efficiency and productivity.[17]

To work its way out of this predicament, CNW seeks to sell its line to the newly formed FRVR. FRVR has a management team drawn from the Wisconsin area and from which the rail industry, with experience in running a small railroad and marketing rail transportation to the paper industry. It intends to draw its work force from existing CNW employees where possible, and anticipates

[16] *Cf. Northern Pacific Acquiring Corp. and Eureka Southern Railroad Co.—Exemption* F.D. 30555 (Decision served January 8, 1988).

[17] Two petitions to revoke the Wisconsin Central exemption (F.D. No. 31102) are now before the Commission.

that it will operate as a union-represented company.[18] Its wage rates will be approximately 85 percent of the Class I standard, and its work rules will give it substantial productivity improvement over the CNW operations. The company also anticipates use of an incentive bonus plan to further productivity. It will own its own engines, operate its own facilities, and rely principally on the CNW for car supply. It has trackage rights over CNW to connect into Milwaukee, and it has connections with other roads at points on the system. The company has already contacted shippers along the lines, and it filed 25 shipper letters acknowledging anticipated support and cooperation with its petition.

CNW estimates that the impact of the sale on its employees will be minimized by FRVR's commitment to the use of former CNW employees. For its part, CNW states that it has employment shortages elsewhere on its system, and that it will make these jobs available to workers affected by the FRVR sale. It anticipates that approximately 20 employees might still be left without employment either on FRVR or the CNW. It has offered a commitment of $30,000 per employee as a separation allowances for any employee unable to secure continued employment with either CNW, by exercising seniority, or with FRVR, under the right of first hire.[19] CNW has offered to meet with its unions to discuss this offer and related issues. According to Petitioner, the unions believe that such discussions must proceed under the auspices of

[18] Verified Statement of S. P. Selby. Selby states that CNW employees currently working on the affected lines are granted right of first hire selected in accordance with qualifications, work records, fitness and ability, and physical and medical standards. Selby states further that he has met with an officer of the Railway Labor Executive's Association to work out a suitable arrangement for union representation of future employees. V.S., at 3-4.

[19] Verified statement of Robert Schmiege.

the Railway Labor Act (RLA).[20] Bargaining under the RLA requires maintenance of the status quo, and permits resort to strikes, lockouts or other form of self-help if an impasse cannot be mediated. CNW takes the position that such bargaining gives labor the power to defeat the FRVR transaction, and is not required. However, informal discussions have taken place, but no agreements have been reached.

CNW has petitioned for a declaration as to the Commission's view of its role in resolving any labor disputes which may arise in connection with the implementation of this Commission authorized transaction.[21] CNW asserts such an action is required to ensure a smooth implementation of the authorized transaction.

The Railway Labor Executives' Association (RLEA) has filed in opposition to the Petition of FRVR and CNW. RLEA believes that the Commission is without jurisdiction to issue the clarifying decision requested by Petitioners, and that Petitioners' argument on the merits is based on erroneous legal interpretations.

DISCUSSION AND CONCLUSIONS

The first of RLEA's propositions appears to be based on a misapprehension of the nature of a declaratory order. It seems beyond question that the Commission has the authority to issue declaratory opinions.[22] RLEA does

[20] 45 U.S.C. 151.

[21] Pursuant to our class exemption rules, 49 CFR 1150.31 *et seq.*, the CNW/FRVR exemption became effective December 30, seven days after filing. Petitioners indicated that they intend to defer consummation until the Commission responds to their petition for clarification. A related petition for exemption of a control relationship between FRVR and its parent corporation has also been filed.

[22] Pursuant to 5 U.S.C. 554(e), an administrative agency is empowered in its discretion to issue declaratory orders to terminate controversy or remove uncertainty.

not directly address this authority, arguing instead that the Interstate Commerce Act (ICA) does not vest this agency with the power "to decide the applicability and scope of other statutes"—that the "Commission is clearly not the tribunal to determine how to resolve conflicting mandates of the ICA and other statutes." That is true enough, if understood to mean that the Commission's opinions on statutory interpretation are, when challenged, subject to judicial review and possible override. There is no dispute over the fact of judicial primacy, but it does not follow that the Commission is foreclosed from expressing its viewpoint, or that such expressions may not issue in declaratory form, when related to the discharge of explicit statutory power, such as the power to approve or exempt the sale of a line of railroad. There is no need to deprive private parties and reviewing courts of the benefit of a clear statement of the Commission's viewpoint. The reason for declaratory opinions is to aid in clarifying and resolving controversies.

A part of the present controversy that requires clarification is whether the Railway Labor Act must be accommodated (in RLEA's words, subordinated) to the Interstate Commerce Act in the circumstances of an approved or exempted line sale arising under section 10901 of the ICA. A related issue is the immunity from injunction under the Norris-LaGuardia Act of a strike that threatens to prevent the consummation of a transaction so approved or exempted.

Until quite recently, it had been an established rule that the orders of the Commission approving the merger, sale, or abandonment of a line of railroad were not subject to collateral attack in the courts, and could not be frustrated by employee actions taken under the aegis of the Railway Labor Act or otherwise.[23] "Congress did not

[23] *Brotherhood of Locomotive Engineers* v. *C&NW*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

intend employees have such power to block consolidations which are in the public interest." [24] However, in a recent Third Circuit proceeding, *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Association.*[25] (*Lake Erie*), it has been held that a district court has no jurisdiction to enjoin a strike taken to block an ICC-approved sale. The Court based this holding on a finding that the Norris-LaGuardia Act need not be accommodated to the Interstate Commerce Act. This decision has had an immediate impact on the formation of small railroads,[26] threatening to halt the revitalization of the marginal railroad sectors—a restructuring that the Commission has found to be in the interest of carriers, labor, and the shipping public.

In its opposition response, RLEA takes the position that the Third Circuit *Lake Erie* decision is correct,[27] and that the Commission should conclude that the Interstate Commerce Act does not supersede the Railway Labor Act or Norris-LaGuardia. RLEA argues that *Brotherhood of R.R. Trainmen* v. *Chicago River and Indian R.R.*[28] (*Chi-*

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[24] *Missouri Pacific Railroad Company* v. *UTU*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987).

[25] No. 87-3664, Slip op., October 26, 1987.

[26] The *Lake Erie* decision has been followed by a Missouri federal district court, *Burlington Northern Railroad* v. *U.T.U.*, No. 86-5013, Slip op., October 26, 1987. (Missouri, Western District).

[27] The *Lake Erie* decision left open the issue of whether bargaining under the Railway Labor Act was necessary. The case was remanded to the district court on the RLA issue. The district court held the RLA applicable to the proposed sale and enjoined consummation of the transaction pending compliance with that act, finding that the Interstate Commerce Act does not operate to relieve the parties from their RLA obligations. *Railway Labor Executives' Assoc.* v. *Pittsburgh & Lake Erie Railroad*, No. 87-1745 Memorandum Opinion (Wes Dis. PA., No. 24, 1987). The case is back in the Third Circuit on appeal.

[28] 353 U.S. 30 (1957).

cago River) and *Boys Markets Inc.* v. *Retail Clerk's Union* [29] (*Boys Market*)—Supreme Court "accommodation" cases relied on by Petitioners—are not controlling since they do not address the Interstate Commerce Act, but are limited to situations where aspects of national labor statutes were in conflict.[30] Hence, RLEA is in agreement with the *Lake Erie* court that statutory preemption of the Norris-LaGuardia no-injunction principle is limited to the need to accommodate other *labor* statutes. Without conceding its legitimacy, RLEA recognizes certain precedent to the effect that ICC authorization of a transaction under the merger provisions (49 U.S.C. 11343) will automatically relieve a carrier from the necessity of compliance with the Railway Labor Act to the extent necessary to go forward with the approved transaction. However, RLEA argues that this precedent has no relevance to 49 U.S.C. 10901 line sales. Unlike line sales, merger orders are provided explicit preemption authority in 49 U.S.C. 11341 [31] and, as income protection and dispute resolution mechanisms are mandatory in merger proceedings,[32] labor is not "left out in the cold." [33] According to RLEA these are critical distinctions.

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[29] 398 U.S. 235 (1970).

[30] Thus, in *Chicago River* an injunction against a strike was sustained where necessary to protect the Railway Labor Act's requirement that "minor" grievances be submitted to arbitration. In *Boys Markets* the court reached a similar conclusion under the Labor Management Relations Act.

[31] A carrier or corporation participating in a transaction approved or exempted by the Commission under subchapter III of Chapter 113 "is exempt from the antitrust laws and from all other laws . . . as necessary to let that person carry out the transaction . . ." By its terms, this section does not apply to line sales under Chapter 109.

[32] 49 U.S.C. 11347.

[33] RLEA cites to language in *Missouri Pacific R. Co.* v. *United Transportation Union* 782 F.2d 109 (8th Cir. 1986). This case

The broad issue presented by the CNW-FRVR Petition and the RLEA Opposition reply is whether the Interstate Commerce Act preempts the Railway Labor Act to the extent necessary to allow the parties to consummate a transaction previously authorized by the Commission. Every court that had ruled on this precise issue prior to the *Lake Erie* decision had answered yes.[34] By so doing, courts have recognized the importance of this agency's role in reconciling the conflicts between public need for an efficient transportation system, (including the need for fair equitable labor relations) and the private disputes that arise invariably from consolidations and restructurings within the rail system. The ICC has inherent powers to impose labor protection where necessary to ensure labor equity,[35] including the power to impose income guarantees and comprehensive schemes for alternative dispute resolution—mechanisms which may include notice, negotiation, a status quo requirement and arbitration. From the 1930's, when the ICC actively became involved in the administration of labor protection, Congress has routinely affirmed and expanded the importance of the Interstate Commerce Act as a part of the

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held that a railroad is exempted under ICA Section 11341(a) from the Railway Labor Act in connection with a transaction approved under 49 U.S.C. 11343. Labor emphasizes that the court there reasoned that inferring preemption of the RLA was reasonable because mandatory labor protection is applied 782 F.2d at 112. There are chronological problems with placing much reliance on the reasoning. The preemption provision was first enacted in 1920, mandatory labor protection in 1940.

[34] *See Missouri Pacific R. Co.* v. *United Transportation Union, supra*; *Brotherhood of Locomotive Engineers* v. *C&NW*, 314 F.2d 424 (8th Cir.), *cert. denied* 375 U.S. 819 (1963). *Cf. ICC* v. *Locomotive Engineers*, 55 USLW 4771 (June 9, 1987) (Concurring Opinion of Justice Stevens, joined by Justices Brennan, Marshall and Blackmun).

[35] *United States* v. *Lowden*, 308 U.S. 225 (1939); *ICC* v. *Railway Labor Assn.*, 315 U.S. 373 (1942).

complex of laws governing labor relations in the rail industry. The Transportation Act of 1940[36] was a legislative affirmation of the Commission's authority to impose labor protection, mandating the use of labor protection in mergers and consolidations.[37] The Railroad Revitalization and Regulatory Reform Act of 1976[38] mandated labor protection in trackage rights, lease transactions, and abandonments. The Staggers Rail Act of 1980 made labor protection mandatory in connection with the abolition of rate bureaus (Section 219 (g) and feeder line sales—section 401), as well as giving the Commission explicit discretion to impose protective conditions on reciprocal switching and on the construction of new rail lines. For more than fifty years the Commission has exercised its authority in this field, frequently at the request and with the support of labor, and our decisions have had enoromus impact on the shape of rail labor relations throughout this period.

It is primarily due to the policy decision to withhold such protections taken in Ex Parte 392 (Sub-No. 1) (and in earlier individual proceedings) that the Commission's authority is under challenge. However, the Commission's policy determinations have been repeatedly sustained, and the existence of our jurisdiction may not hinge on the policy choice made.

In the first place, labor has not been left out in the cold. Affected parties were free to participate in the Ex Parte rulemaking, and are free to petition for its re-

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[36] 54 Stat. 899.

[37] The *Lowden* court, while noting the pendency of the legislation which was to become the 1940 Act, concluded that the legislative initiatives did not militate against the conclusion that the Commission had implied power over labor protection in consolidations, but rather that Congress merely sought to make mandatory what was at the time discretionary. *United States* v. *Lowden*, *supra*, at 239.

[38] 90 Stat. 31.

opening. Indeed, aspects of the rulemaking are now under reconsideration in a reopened proceeding.[39] Further, in individual cases through the revocation process parties are given the opportunity to show that the policy norms of the Ex Parte rulemaking ought not apply. Full participation before the Commission is an important end in itself as it helps to inform the Commission of the range of problems and circumstances confronting transportation. If current policy does not provide routine protection, it is because experience has demonstrated that the formation of new lines would be thwarted, to the overall public detriment. Where exceptions are needed, the Commission has the authority to fashion a full remedy.

Jurisdiction is not determined by outcome. The Commission has exclusive and plenary jurisdiction over the sale, merger, or abandonment of rail lines.[40] This authority was granted by Congress as a part of a regulatory framework, to ensure a rail transportation system in the public interest. As a necessary component of this regulatory framework, the Commission has had to preempt on occasion the operation of other laws to the limited extent necessary to remove obstacles to Commission approved transactions. Such preemption of labor legislation has been upheld even in circumstances where the Commission did not provide labor protection under its auspices.[41] We believe this is the correct interpretation of the matter at issue.

The fact that a particular "labor outcome" does not dictate the extent or effect of ICC jurisdiction is a neces-

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[39] *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, Notice of Proposed Rulemaking served October 2, 1987.

[40] *Brotherhood of Locomotive Engineers* v. *C&NW, supra*; *Chicago and North Western Transportation Co.* v. *Kalo Brick and Tile Co.*, 450 U.S. 311 (1981).

[41] *RLEA* v. *Staten Island Railroad Corp.*, 792 F.2d 7 (2d Cir. 1986) *cert. denied* 107 S. Ct. 927 (1987).

sary correlative to the Commission's discharge of its responsibilities. That the concern for labor equity is only one of many conflicting aspects of National Transportation Policy should not be seen as a derogation of the agency's authority—rather it is precisely the reason why the Interstate Commerce Act must be recognized to have preeminence. It is the public policy of this Nation to regulate and supervise transportation at the national level so as to ensure the essential benefits of a critical aspect of commerce. While the means of regulation have changed markedly over the decades, the exclusive and plenary nature of the Commission's jurisdiction over consolidations, sales and abandonment has been consistently upheld. In the discharge of our responsibilities, we are charged with the expert resolution of many-sided conflicts between disputants, public and private. The recitation above of the factors leading to our small-railroad policy illustrates the complexity of the process and information that led to our present policy.

As with all adversarial proceedings those which come before the Commission generate winners and losers, but it must also be clear that participants ought to, after exhausting lawful appeals aimed at our authority and reasonableness, be reconciled to the process. Allowing a dispersion of authority will compound the problems to the detriment of the public and the transportation system. In the matter at hand, it cannot be doubted that a strike to prevent ICC-approved abandonment is susceptible to injunction. But it is now contended that such a strike can be used to prevent the development of an advantageous alternative to abandonment, despite the fact that Commission jurisdiction over these two types of restructuring is, in all relevant aspects, identical. Our expertise and experience, combined with our system-wide responsibilities, lead us to the conclusion that neither the public nor labor is adequately protected by encouraging a system that prefers abandonment to rejuvenation. We do not believe the law is so structured as to compel that outcome.

Organized as it is, FRVR stands a far better chance of developing a self-sustaining rail operation than does CNW. Over the past quarter century the miles of road operated by CNW has decreased by a third.[42] Its management goals include further reduction in size, either through line sales or abandonment. Whether the lines at issue here could be abandoned immediately under existing law has not been demonstrated. However, fierce trucking competition combined with CNW's comparative disadvantage in rail costs significantly increase the potential of future abandonment. Clearly, the National Transportation Policy will be advanced by permitting the sale of these lines to a willing, experienced and optimistic group of managers, who will in turn rely on experienced labor and a commitment to the local customer base in an attempt to revive and preserve competitive rail transportation for this region of Wisconsin.

This action will not significantly affect either the human environment or energy conservation.

It is ordered:

The Petition of CNW and FRVR for an order clarifying jurisdiction and other matters is granted.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Lamboley and Simmons. Commissioners Lamboley and Simmons dissented with separate expressions.

NORETA R. MCGEE
Secretary

(SEAL)

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[42] *Moody's Transportation Manual* (1963 and 1987 issues) indicates that CNW operated over 15 thousand miles of road in 1962 (including miles operated under contract and trackage rights) but that total had declined to slightly over 10 thousands miles by 1986.

COMMISSIONER SIMMONS, dissenting:

I would have denied the petition for clarification. I have supported the policy expressed by the majority because I believe it has contributed, to some extent, to the preservation of rail lines that otherwise would have been abandoned. However, I do not agree with the majority's use of such glowing terms to describe the efficacy of the Commission's denial of labor protection in so-called "short" line sales under 49 U.S.C. 10901. The language of the decision strongly implies that there can be virtually no valid justification for departure from this policy. Indeed, the decision to grant the petition for clarification and enter this declaratory order to enunciate a policy that has long been settled and affirmed in the courts indicates a certain lack of objectivity and fairness in the application of that policy.

We must not lose sight of our responsibility to weigh the interests of labor as a part of the public interest considerations associated with section 10901 sales. Neither this responsibility, nor the policy of which it is a part is enhanced by the gratuitous declaratory order entered here by the majority.

COMMISSIONER LAMBOLEY, dissenting:

While no one disputes the authority of the Commission to issue declaratory orders,[1] I believe to do so in this instance is an inappropriate use of process. In my view, there is insufficient evidence of controversy or uncertainty to warrant the issuance of this "clarifying" decision.

In invoking the class exemption process under Ex Parte No. 392 (Sub-No. 1) [2] petitioners have also requested that the agency declare that its authority under 49 U.S.C. 10901 supersedes the provisions of the Railway Labor Act (RLA) [3] and the Norris-LaGuardia Act.[4] They do so because of an alleged "climate of uncertainty" which it is claimed impedes consummation of the proposed transaction. Upon closer examination it becomes evident that the alleged controversy or uncertainty results from judicial decisions as well as petitioner's own conduct, neither of which the declaratory order requested from this agency will necessarily resolve. Indeed, this order may well exacerbate matters not only for this case but for constructive activities in this forum on such issues in the future.

Petitioners argue such action is necessary because several recent court decisions [5] "reflects a misapplication of

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[1] 5 U.S.C. 554(e).

[2] Ex Parte No. 392 (Sub-No. 1), *Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985).

[3] 45 U.S.C. 151, *et seq.*

[4] 29 U.S.C. 101, *et seq.*

[5] *Railway Labor Executives' Association v. Pittsburgh & Lake Erie R. Co.*—F.2d—(No. 87-3664, 3rd Cir. October 26, 1987) (*P&LE I*) and *Railway Labor Executives' Association v. Pittsburgh and Lake Erie R. Co.*, Civil Action No. 87-1745 (W. D. Pa. Nov.

the accommodation doctrine and a misunderstanding of this Commission's role in addressing labor issues pertaining to transactions within its jurisdiction." The petitioners do not agree with the outcome of judicial action in which they did not participate, although the Commission did. Without more, the petitioners simply request that the Commission here render a "proper" interpretation of applicable law by declaratory order. Petitioners offer neither substantial reason nor purpose for their request as it may relate to judicial activity.

Additionally, the petitioners claim the Commission's declaratory order is necessary because, while the CNW has met with the rail unions and informal discussions have taken place, no agreements have been reached since the unions believe (apparently contrary to petitioners) that RLA procedures apply to such discussions. The petitioners do not explain why they simply do not file a request with the Commission to fashion and impose appropriate protective conditions, with post consummation negotiation and arbitration procedures, if need be. Such request for relief would squarely address alleged controversy or uncertainty concerns relating to the process and substance of negotiation.

In sum, neither judicial action nor voluntary conduct is sufficient premise upon which to establish controversy or uncertainty as cause for declaratory relief in this case.

Further, quite apart from the lack of any legitimate, demonstrable need for declaratory relief, I fail to see that this order makes any significant contribution toward resolution of statutory "accommodation" issues. There is little doubt that the Commission does not have the requisite *jurisdiction* to interpret the applicability and scope

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1987), appeal pending *sub. nom. Railway Labor Executives' Ass'n v. Lake Erie Co.*, No. 87-3797 (3rd Cir. filed Nov. 25, 1987) (*P&LE II*).

of statutes other than the ICA. Certainly the agency may "express its viewpoint". Such as it is. It is a position which has been expressed repeatedly in court briefs [6] submitted by the Commission, and is well known. This decision appears to be little more than an attempt to supplement arguments in briefs previously filed and bolster prior discussion in Ex Parte No. 392 (Sub-No. 1).[7] It is self-serving and offers no new instruction.

Moreover, of particular concern here, is the eagerness to justify a well known position, the effect of which places the Commission in the position of apparent bias. This is especially true here because, in addition to the extended discussion of the Ex Parte No. 392 (Sub-No. 1) and pre-emption matters, this decision addresses specific employment security and displacement issues in this transaction, and consequently, in anticipatory fashion, effectively prejudices and precludes meaningful consideration of any subsequent petition for revocation raising protective condition issues. The lack of agency constraint here has unfortunate ramifications.

Finally, after all things are considered, it is fair to say that any instability or uncertainty over employment security and displacement issues is largely a consequence of our own doing by decisions such as this, as well as those in Ex Parte No. 392 (Sub-No. 1) and its progeny. Legitimate transportation transactions under the ICA have been authorized in an manner which encourages and permits unilateral abrogation of legitimate, collective bargaining agreements and statutory requirements of the RLA, without procedural or substantive accommodation of respective interests. Mutuality and reciprocity in

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[6] See for example the Commission's brief in *P&LE II*, also a letter to District Judge dated October 8, 1987.

[7] Ex Parte No. 392 (Sub-No. 1), *Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985).

collective bargaining contemplated by the RLA and resultant market-based arrangements have been nullified by our approach. It is small wonder then that the incentives for problem solving and dispute resolution through the negotiation process have been diminished and relations have become unstable.

It has become abundantly clear in these cases that the essence of the dispute is labor relations issues, not transportation.[8] Assuming jurisdiction, the Commission's current fixed position prevents adjustment and resolution in this forum.

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[8] See, also letter dated December 2, 1987 in Finance Docket No. 31163, *Winona Bridge Railroad Company Trackage Rights—Burlington Northern Railroad Company.*